NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA07-1049

JEFFREY BARNES and MELISSA BARNES APPELLANTS V. CHRIS WEST and KAY WEST APPELLEES	**Opinion Delivered** September 24, 2008 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. DR2006-139] HONORABLE CHARLES E. CLAWSON, JUDGE AFFIRMED

WENDELL L. GRIFFEN, Judge

Jeffrey and Melissa Barnes appeal from an order dismissing their complaint for specific performance against appellee Chris West and his then-wife, Kay West, in which appellants requested that the Wests be compelled to permit appellants to exercise an option-to-purchase the Wests' property. Appellants argue that appellee Chris West waived the terms of the option by inducing them to rely on his assurances that they could purchase the property even though the option had expired.[1] Appellants also argue that the circuit court erred in construing the ambiguous terms of the lease in appellee's favor. Because the circuit court's

[1]Mr. West is the sole appellee in this case, as the Wests' divorce decree required Mrs. West to convey her one-half interest in the subject property to him. For ease of reading, the Barneses are collectively referred to as "appellants," and are separately referred to by their respective names. Where reference is made to both Mr. and Mrs. West, they are referred to as "the Wests." Where separate reference is made to Mr. West, he is referred to as "appellee"; Mrs. West is separately referred to by her name.

determination as to whether appellee induced appellants to rely on any oral promises to sell the property after the lease expired turns on the circuit court's credibility determinations, we affirm the order of dismissal.

On December 1, 2003, appellants and the Wests executed a lease agreement that gave appellants the option-to-purchase sixty acres of property that the Wests owned in Center Ridge, Arkansas. The lease stated, in relevant part:

> Prospective lessee desires to lease, with option to buy, this property, for His and Her personal use.
>
> The parties desire to establish an agreement to insure a future lease of the property described in this agreement until "option to buy" is exercised.
>
> ...
>
> TERM OF LEASE
>
> The premises shall be leased to prospective lessee for a period of 1 year from 01/01/03. Prospective lessee shall have the option to renew the lease for 1 additional period of equal duration, on giving written notice to prospective lessor of his & her intent to exercise that option at least 30 days prior to the expiration of the lease. Any additional extensions of the initial lease agreement or any new lease agreement shall be at the option of the prospective lessor.
>
> At the end of the initial lease period, on or about 01/01/05, or anytime [sic] during these lease periods, lessor agrees to sell to lessee the aforementioned property for the sum of the "pay-off" amount of the Farm Credit Services loan plus the "pay-off" amount of the 2nd mortgage....
>
> ...
>
> Prospective lessee shall be liable for all personal property taxes, real estate taxes, and utilities, including water, gas, electricity, and telephone.
>
> ...
>
> This agreement shall constitute the entire agreement between the parties.
>
> ...
>
> Any modification of this agreement or additional obligation assumed by either

party in connection with this agreement shall be binding only if evidenced in a writing signed by each party or an authorized representative of each party.

Attached to the lease was a fill-in-the-blank "Notice of Exercise Purchase Option" form that was never used.

Appellants moved a mobile home onto the property and operated their dog-kennel business thereon until February 15, 2006. They made some business-related improvements to the property both before and after the lease expired. While most of the improvements are "removable," some involve installation of concrete slabs and posts. The lease expired on January 1, 2004. It is undisputed that appellants never attempted to exercise the option-to-purchase the property until July 2005, eighteen months after the option expired.

The Wests separated in February 2005, the month after the lease expired. Mrs. West filed for a divorce in February 2006, requesting that each party be enjoined from disposing of any of their property except by agreement or by court order. In preparation for the divorce proceeding, appellee prepared a document that was printed on March 28, 2006, describing the Wests' assets and liabilities. In this document, which was admitted in the divorce proceedings, appellee described the subject property as: "Farm (acquired before marriage – no payments made during marriage – kay[sic] is not on the deed – contracted to sell at payoff)." On August 3, 2006, Mrs. West executed an agreement in writing to honor the option but appellee refused to sell the property. In August 2006, appellants filed a petition to intervene in the Wests' divorce action, requesting specific performance with regard to the subject property.

The circuit court labeled the lease agreement as "confusing" but concluded that it is

sufficiently clear to determine the terms of the parties' agreement. The court characterized the contract as a lease that was renewable for successive one-year periods, which expired on January 1, 2004, because appellants never gave written notice of their intent to renew the lease after that date. At that point, the relationship became a month-to-month tenancy.

Additionally, the court found that the lease provided appellants an option-to-purchase the property that may have extended as late as January 1, 2005, but it also found that the option was not exercised during the relevant period. Relying on *Synergy Gas Corp. v. H.M. Orsburn & Son, Inc.*, 15 Ark. App. 128, 689 S.W.2d 594 (1985), the court dismissed the petition to intervene, finding that appellants were month-to-month tenants after January 1, 2004, and further finding that their continued payment under the terms of the lease merely constituted rent, not additional consideration for renewal of the lease.

I. Specific Performance/Detrimental Reliance

Appellants' main argument is that the circuit court erred in dismissing their petition to intervene because they are entitled to specific performance of the option-to-purchase the property. The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *See First Nat'l Bank v. Garner*, 86 Ark. App. 213, 167 S.W.3d 664 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

Where land or any estate or interest in land is the subject of an agreement, the right to specific performance is absolute. *See Taylor v. Eagle Ridge Developers, LLC*, 71 Ark. App.

309, 29 S.W.3d 767 (2000). Whether the circuit court should have ordered specific performance of the sale of the land is a question of fact for that court that will not be reversed unless it is clearly erroneous. *See id*. An option-to-purchase contained in a lease expires when the lease is terminated or rescinded, unless separate consideration is given for the option. *See Synergy*, *supra*. The court is without discretion to grant additional time, and the lessee cannot extend the prescribed period merely by holding over and paying rent. *See Synergy*, *supra*.

Appellants raise a promissory estoppel argument, asserting that they are entitled to specific performance because they reasonably and detrimentally relied on appellee's promise to honor the option-to-purchase the property after the lease expired by improving the property and paying the Wests' mortgage payments, taxes, and insurance until February 2006. They further assert that they relied on appellee's representations to their detriment because, had they not relied on his promise to sell the land, they could have used Mr. Barnes's parents' land to conduct their business at no cost.

A promise that the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and that induces such action or forbearance is binding if injustice can be avoided only by enforcement of the promise; the remedy granted for breach may be limited as justice requires. *See Taylor, supra*. Claims of promissory estoppel are questions for the fact finder. The party claiming estoppel must prove that he relied in good faith on the wrongful conduct and has changed his position to his detriment. *See Taylor, supra*. Whether there was actual reliance and whether it was reasonable is also a question for

the trier of fact. *See Taylor, supra*.[2]

Appellants occupied the property from January 1, 2003, until February 2006. They made approximately $15,755.79 in improvements after January 1, 2005. It is undisputed that appellants did not provide the Wests with written notice that they intended to renew the lease when it expired at the end of 2004. Nor did they pay the Wests any money to extend the option, and no writing was created after the lease expired that gave appellants the right to purchase the property. Admittedly, the first time appellants attempted to purchase the property was in July 2005, after the lease had expired.

The testimony conflicted concerning whether appellee represented to appellants that he would sell the property to them after the lease expired. Mrs. Barnes testified that in November 2003, when she informed appellee that they could not purchase the property, he told her, "whenever you are ready just let me know" and "you know I have washed my hands of the farm. As far as I'm concerned it's yours and Jeff's." Mrs. Barnes said that appellee also approved of appellants making continued improvements to the land.

She further testified that in July 2005, when she informed appellee that they were ready to buy the farm, he refused because he had been advised to wait until the end of the year, for tax purposes. Mrs. Barnes stated that appellee again told her to "treat the farm as if it were our own and that he had washed his hands of it." Mrs. Barnes said that she agreed to wait

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[2]Appellee argues that appellants cannot enforce an oral contract to sell land, because such a contract is barred by the statute of frauds. *See* Ark. Code Ann. § 4-59-101(a)(4) (Repl. 2001). However, where one has acted to his detriment solely in reliance on an oral agreement, estoppel may be raised to defeat the defense of the statute of frauds. *See Taylor, supra*.

because she "trusted" appellee, and that, and based on her conversation with appellee, she and her husband continued paying the mortgage, taxes, and insurance on the property.

The July 2005 discussion was corroborated by Mr. Barnes, and by Harold Barnes, Mr. Barnes's father. In addition, Mrs. West testified that even when the option terminated, she and appellee intended to allow appellants to continue to live on the property and that appellants "eventually" intended to buy the property.

Mrs. Barnes next approached appellee at the beginning of 2006 and again asked to purchase the property. She said that appellee refused, explaining that his lawyer advised him to wait, due to the pending divorce proceedings. She further said that appellee assured her that "we would get the farm after the divorce was settled." At this point, Mrs. Barnes feared making further improvements because she "figured that something was up."

Mrs. Barnes broached the subject again in June 2006. She said that appellee responded that Mrs. West "had the farm tied up in the divorce" and wanted to sell the farm at market value (as opposed to the pay-off amount specified in the lease). Mrs. Barnes then called Mrs. West, who informed her that appellee was the party who had the farm "tied up." Mr. Barnes testified that, in June 2006 he asked appellee if they needed to sign another agreement, and appellee said, "no, don't worry about it" and that "everything is fine." Mr. Barnes said that he trusted appellee because he had known him as a friend of the family since childhood.

By contrast, appellee testified that appellants never asked for "an additional option-to-purchase" and that "I was under the impression that it was month-to-month until I decided to exercise my option to sell or not sell." He said that in July 2005, he explained to appellants

that their option had expired, and told them that his situation had changed from November 2003 (when Mrs. Barnes told him they were unable to purchase the property) because he was in the middle of a divorce and because the sale would involve "tax issues." Appellee denied that he had a conversation with Mr. Barnes in which Mr. Barnes asked him to "put something in writing" but admitted that he told Mrs. Barnes he was not going to "force her off the place and she could continue living there." Nonetheless, he maintained that he advised Mrs. Barnes against pouring additional concrete on the property. He also said that appellants never informed him that they continued to make improvements to the property after the lease expired.

Appellee conceded that he prepared the document listing the property as an asset "contracted to sell at payoff" and that he e-mailed the document to Mrs. West. He further "admitted" that the statement about the property being under contract was not true, and averred that he should not have put that statement in the asset list.

We must affirm because we cannot reverse while deferring to the circuit court's credibility findings. A conflict in testimony regarding reliance on oral promises pertaining to a written lease, like any other conflict in testimony, is resolved by the trier of fact. *See Taylor, supra*. The circuit court's order here makes sense only if the court found credible appellee's testimony that he never represented to appellants that they could purchase the property and make improvements thereon after the lease expired. The court apparently chose to credit

appellee's testimony over the testimony of the other four witnesses, including Mrs. West.[3]

Where the testimony is conflicting, we do not pass upon the credibility of the witnesses and have no right to disregard the testimony of any witness after the trier-of-fact has given it full credence, unless the testimony was inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ thereon. *See Barnes v. State*, 258 Ark. 565, 528 S.W.2d 370 (1975). Accordingly, we give deference to the circuit court's apparent credibility findings in this case.

In turn, this means that the terms of the lease are dispositive, rather than appellee's alleged conduct inducing reliance on his oral promises. The lease is clear. The option must be exercised *within the lease periods* stated therein. Moreover, the lease in this case expired January 1, 2004, because appellants did not notify the Wests in writing, at least thirty days prior to January 1, 2004, that they intended to renew the lease. Because appellants failed to properly renew pursuant to the time and notice terms of the lease, the second "lease period" never went into effect. *See Synergy, supra*.

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[3]In affirming, we do not condone appellee's conduct in misrepresenting the property as "contracted to sell at payoff" in the divorce proceedings. However, it was for the circuit court to determine the weight to give his conduct. Further, as he argues, his misrepresentation is evidence of impeachment, not waiver, because there is no evidence that appellants saw or relied on the asset list in failing to exercise their option.

Additionally, it has not escaped our attention that appellee argues that he was the *sole* owner of the subject property before the lease was executed. That argument is plainly refuted by the parties' divorce decree, in which the circuit court determined that the "parties" owned the property and ordered Mrs. West to quitclaim her one-half interest in the property to appellee.

Thus, appellants merely continued the terms of the lease in their month-to-month arrangement. Their payment of the mortgage, taxes, and insurance did not constitute separate consideration for renewing the lease or extending the option period. *See Synergy, supra*. Hence, appellants' first attempt to purchase the property, in July 2005, *eighteen months* after the lease expired, was ineffective because it was not written and was not timely. *See Synergy, supra* (affirming the denial of a suit to compel specific performance to exercise an option-to-purchase property, because the lease was not validly extended where the lessee tendered late renewal notice, the lessor informed the lessee of its intent to hold the lessee to the required notice, and there was no hint of waiver by the lessor). We hold that the circuit court here did not err in denying appellants' motion to intervene because they are not entitled to specific performance.

II. Ambiguity

Appellants also argue that the circuit court erred in interpreting the ambiguous terms of the lease in favor of appellee.[4] They claim that the ambiguities in the lease should be construed against appellee "in conjunction with the evidence in support of [appellants'] claim of detrimental reliance."

With regard to the language explaining the lease periods and renewals, the circuit court stated:

Well, here's part of my problem. This lease says in Section Two: At the end of the

[4]Appellee argues that we should not consider the ambiguity issue because it has been raised for the first time on appeal. Although appellants did not raise the issue below, the circuit court clearly considered the issue and ruled on it.

> initial lease period on or about 01/01/04 or at the end of the second lease period on or about 01/01/05 or during any – any time during these lease periods, the lessor agrees to sell.
>
> The first paragraph says it's a one-year lease. The second paragraph says it's a two-year lease. Then it goes on to say: Or any time during these lease periods.

Appellants correctly argue that any ambiguity should be construed against the Wests, as the drafters of the lease. *See Byme, Inc. v. Ivy*, 367 Ark. 451, 241 S.W.3d 229 (2006). Yet, that interpretation principle does not aid appellants' argument because they do not explain how their equitable theory of promissory estoppel should work "in conjunction" with the contractual ambiguity theory. If appellants prevail on their estoppel theory, then the terms of the lease are not dispositive – in fact, the terms of the lease *would not apply* because the theory is that appellee should be estopped from asserting that appellants did not comply with the lease.

Finally, appellants also fail to explain how the lease terms may be construed to support that the lease gave them the legal right to exercise an option-to-purchase the property after the lease expired. Even if construing the lease against appellee means that appellants had until January 1, 2005, to exercise the option-to-purchase, they did not attempt to do so for the first time until July 2005.

Affirmed.

HART and HUNT, JJ., agree.